Therefore, the Commission concluded that programming and commercial guidelines, ascertainment requirements and various structural safeguards such as long form renewal applications, ownership and duopoly rules were no longer necessary to ensure that broadcasters fulfilled their public interest obligations.

The repeal of each rule, requirement or guideline individually speaks directly to a deregulatory trend. Collectively the reversals also reveal a pattern of veiled intentions on part of the FCC. The following describes selected Commission actions which illustrate its less than direct deregulatory posturing:

1. Postcard Renewal Rulemaking Proceeding

On March 26, 1981, after extensive rulemaking, the Commission implemented a "dramatic shift in [its] renewal procedures" by adopting a license renewal application the size of a large postcard.[32] The Commission determined it no longer needed to scrutinize licensees' past and proposed programming prior to granting license renewals. Therefore, the postcard renewal application was amended to seek no information about the licensee's programming. The card simply asks a few "yes" or "no" questions, answerable merely by checking the appropriate box. These questions only require the applicant to: 1)confirm

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[32] Radio Broadcast Services Revision of Applications for Renewal of License for Commercial and Noncommercial AM, FM and Television Licenses, 49 RR2d 740, 741, 759 (1981); Black Citizens for a Fair Media v. FCC, 719 F2d 407 (D.C. Cir. 1983) (hereinafter "Postcard Renewal"). As discussed supra at note 17, at this time, the renewal application form was 19 pages long.

the accuracy of information previously filed with the Commission regarding equal employment and ownership reports; 2) confirm the placement of the requisite materials in the station's public inspection file; and 3) if applicable, report any adverse findings or judgments rendered by a court or administrative agency concerning the licensee's character or business practices.

This license renewal procedure does not inquire into a licensee's previous or future programming proposals. It does not require a license to report on its ascertainment efforts or commercial practices. It relieves licensees from filing Annual Programming Reports and prevents the public from exercising any oversight function.[33] The postcard application simply disregards the traditional interpretation of the Communications Act which requires Commission review of programming as a statutory prerequisite to the granting or extension of a broadcast license.

Postcard renewal dramatically goes against decades of consistently developed and continually honed renewal procedures -- procedures specifically designed to elicit necessary information on a licensee's nonentertainment programming. The Commission justified this abrupt change in renewal policy on grounds of efficiency.[34] Arguing that the routine handling of the long form renewal application uncovered few violations, the Commission concluded that a simplified form would just as adequately, but more efficiently, ensure compliance with

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[33] Id. at 755-57.

[34] Id. at 747.

Commission rules and regulations while also satisfying the needs for paper work reduction.[35]

The Commission also justified its "Postcard Renewal" procedures by ensuring that through maintaining and logging of programming records, the public and the Commission would continue to have available all relevant information necessary to conduct in depth reviews of licensees' performances.[36] Unfortunately, in subsequent rulemaking procedures, the Commission also ultimately eliminated these informational safeguards.

2. Television Deregulation Rulemaking Proceeding

In 1984, the Commission issued a Report and Order (T.V. Deregulation) essentially eliminating all quantitative programming and ascertainment guidelines.[37] The Commission justified the elimination of programming guidelines by arguing that programming decisions respond, not to the Commission's regulatory procedures, but rather to the tastes, needs and interests of the viewing public.[38] The Commission pointed to the

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[35] Id. at 747-48.

[36] Id. at 750.

[37] Revised Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984), recon. denied, 104 F.C.C. 2d 358 (1986), rev'd in part on other grounds, ACT v. FCC, 821 F2d 741 (D.C. Cir. 1987 (hereinafter T.V. Deregulat

[38] "Our review of the record and study of station performance persuades us that licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines." Id. at 1080.

programming performance of commercial television licensees to support the elimination of programming guidelines.

According to studies by the FCC and the National Association of Broadcasters, licensees provided levels of informational, local and non-entertainment programming far in excess of FCC guidelines. Based upon the studies, the Commission decided the guidelines were obsolete or concluded that even in the absence of guidelines, licensees would continue to provide sufficient levels of non entertainment programming.[39] It was consequently determined that licensees air non-entertainment programming, not on account of regulatory requirements, but in response to basic market demand.

Market theory was used once more by the Commission in T.V. Deregulation to justify the elimination of not only programming guidelines but also commercial guidelines and ascertainment requirements. Since 1973, the Commission enforced a sixteen minute per hour commercial maximum guideline.[40] In 1984, however, the Commission concluded that its commercialization guidelines were unnecessary[41] after citing National Association of Broadcasters (NAB) statistics purporting to show that most

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[39] Id.

[40] T.V. Deregulation, 98 F.C.C.2d at 1101. Although the Commission's guidelines did not expressly prohibit broadcasting greater than sixteen commercial minutes per hour, a licensee that advertised more than sixteen minutes would face full Commission scrutiny upon license renewal.

[41] Id. at 1103.

stations carried fewer than sixteen minutes of commercials. The Commission believed that competitive forces inherent in the marketplace would restrain over commercialization. Their rationale was that audiences avoid stations with excessive advertisements thus deterring potential advertisers from purchasing air on those stations.

The FCC agreed that advertisers would avoid stations with excessive commercialization not merely because these stations reach fewer people, but because the clutter of commercial matter tends to diminish the effectiveness of their ads.[42] By removing commercialization guidelines in 1984, the Commission opened the door for the proliferation of channels and entire networks devoted exclusively to sales, infomercials and program length commercials.

a. Ascertainment

The Commission in T.V. Deregulation also eliminated community ascertainment requirements.[43] The Commission argued that licensees exceed quantitative guidelines simply because their viewers desire non-entertainment programming. Therefore, according to the Commission, commercial necessity demands that the "broadcaster... remain aware of the issues of the community or run the risk of losing its audience."[44] Since "market forces

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[42] Id. at 1105.

[43] Id. at 1098.

[44] Id. at 1098-99.

provide adequate incentives for licensees to remain familiar with their communities",[45] according to the Commission, there is no need to retain ascertainment regulation. This has resulted in local programming that neither reflect the community of service or its interests.

To coincide with its market-incentive deregulatory scheme, the Commission in T.V. Deregulation eliminated programming logs along with the requirement that broadcasters submit quarterly issues/programs list.[46] Rather than require a licensee to maintain a contemporaneous listing of all programs aired, they now need only compile "a list of programs that ... provide the station's most significant treatment of community issues during the preceding three month period."[47]

By adopting this issue/programming list requirement, the Commission failed to recognize that detailed programming logs, although more burdensome than compiling a simple list, enabled the Commission to make an informed public interest finding about

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[45] Id.

[46] Id. at 1077. In response to a Court decision, the Commission retained the requirement that each station prepare and maintain a list of issues dealt with in programs aired during the quarter. See Office of Communication of the United Church of Christ v. FCC, 702 F.2d 1413 (D.C.Cir. 1983); Office of Communication of the United Church of Christ v. FCC, 779 F.2d 702 (D.C. Cir. 1985).

[47] Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Memorandum Opinion and Order, 98 F.C.C. 2d 1076 (1984), recon., 104 F.C.C.2d 358, 372 (1986), aff'd in part and remanded in part, ACT v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

public service performance. The abridged issues/program list does not, in practice, provide sufficient information necessary for the public to make a prima facie showing that a license renewal will not serve the public interest.[48] Therefore, these deregulatory measures, although independently damaging to the Commission and the public's oversight functions, jointly eliminate any substantive determination about a licensee's ability to broadcast in the public interest.

3. Fairness Doctrine

For over fifty years the Commission advocated that "the public interest requires that the licensee ... operate on a basis of overall fairness, making his facilities available for the expression of contrasting views of all responsible elements in the community on the various issues which arise."[49] Despite support for this doctrine since 1927, the Commission in the early 1980's stopped enforcing the requirement that stations present opposing points of view on issues of public importance.[50] Claiming that the doctrine was an unconstitutional infringement on first amendment freedoms, the Commission formally abolished the fairness doctrine in 1987.[51]

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[48] See generally In Re: License Renewal Applications of Commercial Television Licensees Serving Philadelphia, Pennsylvania, Petition For Reconsideration, MM Docket No. 90-158, July 30, 1990.

[49] Report of the Commission in Docket No. 851, 13 FCC 1246, 1250 (1949).

[50] See Ferral, supra note 47 at 23.

[51] Syracuse Peace Council, 2 F.C.C. Rcd 5043 (1987).

The Commission's repeal of this doctrine was just another step in the Commission's incremental deregulatory process. By not enforcing the doctrine, the FCC enabled the decline of non-entertainment programming. Since most of the programming presented which complied with the Fairness Doctrine was public affairs, removal of the doctrine decreased the quantity of this type of non-entertainment programming.[52]

4. Multiple Ownership Rules

As a means to ensure diversity of viewpoint, FCC rules had prohibited a licensee from owning more than seven stations in each broadcast service -- i.e. seven television, seven A.M. and seven F.M. stations in the same market since 1954.[53] However, in 1984, relying on free market theories, the Commission relaxed its rules and raised the limit on ownership to twelve stations in each broadcast service.[54] Within a year, eight of the twenty largest television station operators (those who penetrate the largest audience) owned more than seven stations.[55]

Consistent with its backhanded incremental deregulatory

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[52] See Ferral, supra note 47, at 23.

[53] 43 F.C.C. 2797 (1954).

[54] 100 F.C.C.2d 74 (1984). "Licensees can own an interest in an additional two stations in each service if the additional stations are more than fifty percent owned by minority group members. The VHF limit was removed but the television stations owned cannot have an aggregate national potential audience of more than twenty-five percent of all households (thirty percent if the stations are minority-controlled). 73 C.F.R. § 73.355 (d)(2)[1984]." See Ferral, supra note 47, at 16, n. 13.

[55] Broadcasting, Dec. 30, 1985, at 39.

policies, the Commission is currently considering raising the caps on station ownership once again.[56] The Commission will also address the cross ownership prohibitions against common ownership of television stations or broadcast networks and cable systems in the same market.[57] In addition, the Commission intends to consider repealing or relaxing the duopoly rules which currently proscribe common ownership of television stations with overlapping service area.[58]

The Commission argues that relaxation of these rules may create synergy -- stronger stations and better service.[59] The Commission also argues that the competitive nature of the broadcast industry, which offers numerous media alternatives to the public, diminishes the threat of silencing minority views.[60] However, by allowing big owners to grow even larger, the likelihood that large bureaucratically run broadcast stations will respond to local needs and desires diminishes. Furthermore, although cable and satellite television may enhance the public's viewing choices, by limiting the ownership of the most watched

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[56] Broadcasting, Apr. 29, 1991 at 19.

[57] Id.

[58] 47 C.F.R. § 73.3555(a)(3). The rule specifically forbids the common ownership of stations with overlapping grade B contours. A "[g]rade B contour demarks an area with a quality of service acceptable at 50% of the locations 90% of the time." Wheeling Antenna Co. v. United States, 391 F.2d 179, 181 (4th Cir. 1968).

[59] Broadcasting, Apr. 29, 1991 at 19.

[60] Id.

over-the-air broadcast signals to a few wealthy individuals, the Commission will clearly curtail the diversity of views. The danger of silencing minority views is further exacerbated by the Commission's previous repeal of the fairness doctrine. The Commission's repeal or relaxation of ownership rules represents yet another backward deregulatory step in the process of relinquishing all control over television broadcasting.

5. Programming Statements

When regulatory reforms adopted for radio were extended to television in 1984, numerous television license applicants interpreted Form 301, the initial broadcast license application, to require only a "a brief narrative statement of planned programming service relating to issues focusing on the service area"[61]. Although this revision primarily affected AM and FM radio, as opposed to television, many television applicants after 1984 provided only a brief, if any, description of their proposed programming. The dearth of information available to the Commission precluded all assessment of the qualitative and quantitative aspects of the applicant's proposal -- thus undermining the Commission's ability to ensure broadcasting in the public interest. Nevertheless, the Commission today grants numerous broadcast licenses without any inquiry into the programming proposals of the applicant. This breaks a long tradition of equating a broadcaster's programming with an

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61 Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 50 RR.2d 381, 382 (1981).

assessment of the public interest.

6. Anti-trafficking Regulation

For more than forty years the FCC expressly prohibited the buying of stations for the purpose of reselling them at a profit.[62] The Commission viewed trafficking in licensees as an inherent violation of a licensee's trust-like obligation to broadcast in the public interest. Codified in 1962, anti-trafficking legislation created a strong though rebuttable, presumption that a licensee who failed to operate a station for at least three years was guilty of trafficking.[63] Consequently, those unwilling to operate a station for at least three years did not purchase a station.

In 1982 the Commission repealed the three year rule. The Commission justified the repeal by arguing that under

> the present competitive environment, the public interest is better served by permitting market forces to govern station sales transactions, rather than attempting to restrict artificially the effect of 'higher valued uses' of broadcast properties.[64]

The elimination of the three year rule opened the broadcast market to station traders -- speculators with no enduring interest in operating the stations they purchase.[65] With the

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[62] See In the Matter of Power Crosley, Jr., 11 F.C.C. 3, 23 (1945).

[63] 32 F.C.C.2d 689 (1962).

[64] 52 RR.2d 1081 (1982).

[65] See Ferral, supra note 47 at 17.

repeal of the three-year rule, demand as well as prices for television and radio stations has soared. Today many broadcasters face severe debt burden as they try to finance the purchase of these stations at prohibitively high prices.[66]

CONCLUSION

Whether the issue is diversity in ownership of the media or public participation in the licensing process, the Federal Communications Commission may opt to fulfill its public interest mandate in various ways. Although the degree to which the Commission regulates licensees and the broadcast industry is discretionary, the enforcement of the broadcaster's bedrock obligation to the public is not.

Concepts like community and issue responsive programming, equal opportunity employment in broadcasting and fostering robust communication within an informed society are still central to the business of broadcasting. The FCC is the ultimate manager who must be able to asses and acknowledge when its methods are less than effective. The deregulatory course taken by the FCC over the last ten years has not been entirely unwarranted, but it has also not been entirely in the public's interest. The FCC has in effect, traded its traffic cop hat for one of a privately employed security guard of the air waves who has often been caught sleeping on the job while market forces freely escort the broadcast industry to and fro.

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[66] Id.

The rule makings of the late seventies and eighties may have afforded regulatory relief to the broadcast industry but those same repeals have also cost the public quality programming and proprietary participation. The spirit of the Communications Act requires the Commission to police the spectrum with the full force and effect of the public interest standard. Today's deregulation scheme is a live demonstration of an administrative magic show fully equipped with smoke and mirrors. Now you see regulation; now you don't. Now the Commission promises to protect the public interest; now it does not.

There may have been no true intent to dismantle the trusteeship model of broadcasting but the injury remains the same. Regardless, the FCC can not be absolved of its responsibility to carry out its original charge. Anything less would contravene the Communications Act and directly contradict what Congress clearly intended.